CANADIAN CONSUMER COUNCIL

CONSEIL CANADIEN DE LA CONSOMMATION

THE CASE FOR A CONSUMER ADVOCATE

by

M. J. Trebilcock
Professor of Law
University of Toronto

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TABLE OF CONTENTS

PREFACE

My terms of reference required me to report on and analyze recent debates in the United States on the case for a Consumer Advocate, funded by government, to represent the consumer interest before government and to regulatory agencies. Only a limited attempt has been made in this paper to relate the American experiences to the Canadian regulatory scene. I am aware that the Canadian Consumer Council has recently undertaken a number of studies of particular Canadian regulatory agencies. When these studies have been completed, a much fuller evaluation of the relevance of the Consumer Advocate concept to Canada can be undertaken. This paper is an attempt to delineate the issues implicit in this concept so that a framework will have been laid within which such an evaluation can be readily and incisively made.

I wish to acknowledge the invaluable assistance I received from the following persons with whom I discussed the question of a Consumer Advocate in a series of interviews in Washington in early August, 1972:

Congressman Frank Horton (R, N.Y.)

Dr. J. Martin, staff, Senate Anti-Trust Subcommittee

Mr. Robert J. Wager and staff, Staff-Director and General Counsel, Subcommittee on Executive Reorganization of the Senate Committee on Government Operations

Mr. Peter S. Barash, legislative assistant to Congressman Benjamin S. Rosenthal (D, N.Y.)

Mr. Joseph Luman, staff, House Committee on Government Operations.

Mr. Alan B. Morrison, Director of Litigation, Ralph Nader's Public Interest Law Groups

Mr. Lowell Dodge, Director of the Centre for Auto Safety.

At the time that this paper was submitted, it was learnt that a Senate filibuster has killed prospects of Senate action on a Consumer Advocate bill this year.

I THE PROBLEM DEFINED

(i) Regulatees or Regulators?

The ailment has been widely diagnosed. Consumer spokesmen, government commissions of inquiry, appellate courts, political leaders, even sometimes public regulators themselves, critics from all points of the political spectrum, have recognised the same phenomenon. Ralph Nader, writing in The Great American Gyp, states: "[Regulator agencies] have now become apologists for business instead of protectors of the public".[1] James Landis in a report on the Federal Regulatory Agencies to President-elect John F. Kennedy wrote that frequently "the regulatees have become the regulators....."[2] The Court of Appeals for the D.C. Court in a recent case said: "[One must face] the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented towards the interests of the industry it is designed to regulate, rather than the public interest it is supposed to protect."[3] Roger C. Cramton, Chairman of the U.S. Administrative Conference states:

> "The cardinal fact .... is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of having lawyers and expert witnesses to make a case for them. Non economic interests or those economic interests that are diffuse in character tend to be inadequately represented...."[4]

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1. New York Review of Books, Nov. 21, 1968, p.27.
2. Report on Regulatory Agencies to the President-Elect, 1960, p. 70.
3. Moss v. C.A.B. 430 F.2d 891 at 893 (D.C. Circ. 1970.
4. (1972) 60 Georgetown L.J. 529.

Congressman Benjamin S. Rosenthal of the U.S. House of Representatives said recently in Senate Committee Hearings:

> "There are approximately 50 Federal Agencies and bureaus performing some 200 or 300 functions affecting the consumer ... All of these agencies ... have been established to represent the public interest and the consumer. And yet, they have failed to do that for one simple reason. I don't even suggest that anyone did anything deliberately but what happened was that the voice of the consumer has never been heard in Washington effectively. There has been an empty chair for the consumer everywhere: the public utility companies have their hearings for rate increases, and they are supported by lawyers, economic investigators, and very skillful people, and the other seat for the consumer has obviously been empty. We have had an empty seat for some 30 odd years here in Washington ....."[5]

Commissioner Nicholas Johnson of the Federal Communications Commission says:

> "The Commissions too often find themselves groping their way into the future along pathways illumined by too few facts. Inadequate investigatory facilities and the simple lack of will to fully analyze a problem have continued to feed the commissions a starvation diet of the necessary factual material. When the facts are available, they are too often provided by industry loyalists. While there have recently been encouraging signs, citizen participation in the agency decision making process remains virtually non-existent."[6]

Commissioner Philip Elman of the Federal Trade Commission reports the same experience:

> "In making decisions ..., the Commission has before it only the views of its staff and the parties, who are applying for example, to have a proposed merger approved as not violating an outstanding order. The benefits of adversary intervention are lacking and the Commission is in a very real sense at the mercy of its staff. If the staff fails adequately to represent the public interest and to raise all the relevant questions, no-one else will."[7]

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5. Hearings, Subcommittee on Executive Recognization and Government Research of the U.S. Senate Committee on Government Operations, on S.1177 and H.R. 10835, 1st Sess. 92 Cong. Nov. 4, 1971.

6. A New Fidelity to the Regulatory Ideal (1970-71) 59 Georgetown L.J.869 at 875, 876.

7. Administrative Reform of the Federal Trade Commission (1971) 59 Georgetown L.J.777 at 789 and 790.

Lest in Canada we suppose that the problem of the integrity of the regulatory process is not potentially of the same moment as in the U.S., it should be pointed out that according to a recent Canadian Consumer Council study, there are 117 Federal regulatory agencies, 70 public regulatory agencies in Ontario, 53 in Quebec, and upwards of 30 in most other Provinces. Probably half of these in each jurisdiction perform functions which directly impinge upon the consumer interest, regulating everything from the fixing of telephone rates, to allocation of air-routes and broadcasting licenses, to the fixing of tariffs and agricultural produce prices and food, drug and product safety standards. Who occupies the consumer's chair before these agencies? In January, 1972, a senior member of the Canadian Government, Minister of Finance John Turner implied the answer:

> "I've looked at a lot of regulatory agencies, and the longer I'm around here, the more I believe that every one of these tends, in a period of time, to reflect the interests of the industry it is supposed to be regulating." [8]

The tangible dimensions of this phenomenon can be easily exemplified. Commissioner Nicholas Johnson cites a proposal for a rule change by the F.C.C. which would have reduced the practical possibility of citizen participation in F.C.C. proceedings. 166 broadcast stations filed supporting briefs. Opposing briefs were filed only by the United Church of Christ (6 pages) and the Citizens' Committee for Broadcasting (a three paragraph letter). Commissioner Philip Elman cites a F.T.C. hearing on new flammability standards for children's blankets. Industry was widely represented. Literally no consumer was represented in the proceeding, and despite clear evidence that the proposed standards still permitted a dangerous level of flammability, they were adopted.

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8. Cited by Jo Levy Sack and Jeffrey Sack, Citizens' Advocates and Poverty Lawyers, Canadian Forum, May 1972, p. 37.

Congress had subsequently to strengthen them by legislation.[9] In recent testimony in Congressional Committee hearings, a former U.S. Department of Agriculture official was asked, in relation to Departmental marketing orders fixing milk prices, whether there are ever any consumer spokesmen present at these proceedings. He replied, "generally not."[9a]

In Canada, where numerous agricultural marketing boards exist, the same experience obtains. In applications before the Canadian Transport Commission by Bell Telephone Company for increases in telephone tariffs, consumers are almost never represented in proceedings. In the 1972 Bell Telephone rate hearings, which lasted almost a month, the only direct consumer participation was a Quebec farmer who asked an occasional question and a woman who was allowed to speak for half an hour at the end of the hearings. Both appeared in person and were not equipped to begin to challenge the massive quantity of technical and accounting information presented by Bell to the Commission. Ten lawyers appeared for the other parties, including three for Bell. The hearings resulted in aggregate rate increases of 47 million dollars a year. Executives of Bell estimate that their submission cost the company "several hundred thousand dollars". The disparity between the resources invested in the case for a rate increase and the consumer case against a rate increase is patent.

Recently, following the introduction of the Competition Bill, the Minister of Consumer and Corporate Affairs reportedly received 300 briefs from critical business interests seeking to weaken the bill and only 8 from consumers or consumer groups supporting the bill or seeking to have it strengthened. One retail grocery chain alone reportedly spent $20,000 in preparing a brief on the bill.

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9. op. cit. at 791

9a. Hearings before a Sub-committee of the Committee on Government Operations, H.R. 91st cong., 1st sess., on H.R. 6037, pp. 135, 136.

The bill was subsequently withdrawn, apparently in response to business pressure. An indication of the logistical differential between the representation power of business interests and consumer interests is given by the scale of operations of just one U.S. trade association. In questioning in Congressional Committee hearings, an official of the U.S. National Association of Manufacturers stated that his association employed 100 full-time staff in New York and 40 in Washington and had an annual budget of $6 million.[10] It has been estimated that in the grocery trade alone in the U.S. there are 1000 different trade associations all designed to promote the interests of their members, including the promotion of their interests in the public sector. This is aside from the fact that most members of government themselves come from business or professional backgrounds which makes it easy for them to understand and identify with business interests on many regulatory issues.

(ii) Why Has It Happened?

The reasons why one finds this imbalance in representation of interests before public regulatory agencies are not hard to identify. Mr. Roger Cramton, chairman of the U.S. Administrative Conference, summarises them as follows:

> "For an individual consumer to intervene in a regulatory controversy that will affect him, for example, only in his capacity as an occasional purchaser of auto tires, is irrational behaviour on his part, since the costs of effective participation will be much greater than any benefits he might hope to obtain. Moreover, the transaction costs of assembling a group of persons, each of whom will suffer only a modest harm by a threatened administrative action, so that they may participate through a common spokesman are extremely large. Even if the transaction costs of group representation were not so large, a number of potential contributors to a common fund are likely to take a free ride at the expense of others."[11]

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10. Hearings before a Subcommittee of the Committee on Government Operations, H.R. 92, Cong. 1st session 1971, H.R. 16, 3809, 254, and 1015, pp. 331, 332.

11. "The Why, Where and How of Broadened Public Participation in the Administrative Process", (1972) 60 Georgetown L.J. 525 at 529.

Cramton goes on to point out that the bias that these factors produce in the regulatory process does not reflect dishonesty or corruptness on the part of the regulators but is a consequence of the fact that regulators' "perspectives are limited by the information that is available to them, and their attitudes are shaped by the rewards and feed back that our system provides to them".[12]

Milton Friedman, the doyen of contemporary free market economists, cites a homely but pointed illustration of this phenomenon, the ever-escalating standards of occupational licensure for barbers:

> "The declaration by a large number of different state legislatures that barbers must be approved by a committee of other barbers is hardly persuasive evidence that there is in fact a public interest in having such legislation. Surely the explanation is different; it is that a producer group tends to be more concentrated politically than a consumer group. This is an obvious point often made and yet one whose importance cannot be overstressed. Each of us is a producer and also a consumer. However, we are much more specialized and devote a much larger fraction of our attention to our activity as a producer than as a consumer. We consume literally thousands if not millions of items. The result is that people in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering. The same point holds for tariffs. The groups that think they have a special interest in particular tariffs are concentrated groups to whom the issue makes a great deal of difference. The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest."[13]

James Landis in his report to President Kennedy describes the effect of these

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12. Ibid. at 529, 530

13. "Capitalism and Freedom", page 143.

pressures on the regulatory agencies:

"It is the daily machine-gun impact on both agency and its staff of industry representation that makes for industry orientation on the part of my honest and capable agency members as well as agency staff."[14]

The specific costs, direct and indirect, which inhibit consumer participation in regulatory processes embrace the problems of providing effective notice of the timing and nature of proceedings to an amorphous interest group like consumers, the costs entailed in securing counsel expert in the area in issue, the costs of providing expert witnesses and evidence, transcript costs, etc. It has been estimated that a major F.T.C. hearing, which may extend over many months, and involve hundreds of witnesses and generate a record running into tens of thousands of pages, will often cost a fully participating party $100,000.

(iii) The Political Significance of Imbalance in Representation of Interests

The political significance of the disparity in the effectiveness of representation of affected interest groups in the regulatory process has been well analyzed by Charles Reich. Reich argues that the central myth of our present administrative law is the belief that decisions concerning planning and allocation of resources can be and are made on an objective basis. The myth holds that administrative decisions are not primarly choices between values but value-free decisions based solely or primarily on a body of technical expertise residing in the agency in question. However, as Reich points out, almost all decisions of regulatory agencies, while involving hopefully an expert ascertainment of the facts, ultimately involve heavily value-laden decisions about social priorties, for example, highways v. public transport, energy resources v. the environment, safe automobiles v. costly autombiles, a domestic agricultural industry v. cheaper imported foodstuffs, etc., etc.,,. Because this political aspect is integral to

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14. op. cit., p. 71

the regulatory process, it should not be surprising that regulatory agencies arrive at their decisions in an essentially political way. Reich writes:

> "As the agencies have sought a meaning for the public interest, they have come to this: the public interest is served by agency policies which harmonize as many as possible of the competing interests present in a given situation . . . Thus the agencies have evolved a meaning for their charters which makes them both philospher -kings searching for the good and practical politicians trying to please a multi-voiced rabble."[15]

Reich goes on to describe the consequences of the lack of representation of all affected interest groups in the regulatory process:

> "The very concept of balancing is in one sense a contradiction of the concept of planning. Fashioning values and goals out of existing interests prevents any really long-range policy-making or planning from ever being done. It equates policy-making with satisfying the majority or the most powerful interest, although the country might benefit more from policies which favour weaker or minority interests, or interests not yet in existence. It tends to place emphasis on those interests which have a commercial or pecuniary value as against intangible interests such as scenery or recreation. The most fundamental infirmity of the present concept of the public interest as a guide for planning is that it defeats planning by responding only to immediate pressures."[16]

(iv) Possible Directions in Reform

Over the years, particularly in the United States where a tradition of critical analysis of the performance of regulatory agencies is of long-standing, a variety of proposals have been advanced that purport inter alia to deal with this bias in the regulatory process. These proposals fall broadly into two categories: (a) those which focus on the internal structure of the agencies and (b) those which focus on the need for increased citizen input into the regulatory process. These two categories of proposals are, of course, in no way incompatible with each other, although they do reflect a different judgment of where the sources of the principal problems of regulatory agencies lie.

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15. "The Law of the Planned Society", 75 Yale L.J. 1227 at 1234 (1966).

16. op. cit. at 1239.

Critics who focus on structure contend, for example, that if in a U.S. context, the independent regulatory agencies were to become executive agencies under the direct control of the President, the latter would be able to act as an effective counter-veiling force to business bias in the regulatory process. Others point out, on the other hand, that the general public for the very reasons they were not represented in the regulatory process in the first place are not likely to react adversely to an agency decision unless it approaches or exposes something akin to a public scandal, whereas a President in all but these cases is likely to sustain greater political damage by offending well-defined and highly articulate business interests. Those who take this view point to existing experience with executive regulatory bodies, which, they claim, bears out these fears. Other proposals emphasizing structure include suggestions that agencies consist of a single commissioner instead of a collegiate commission on the grounds inter alia that this will lead to higher visibility on the part of the decision-makers and thus greater popular accountability. Others respond that any benefits, in terms of increased public participation at least, from such a change would, in all likelihood, be marginal. Again they point to experience with executive regulatory bodies where a collegiate form of administration has not been present.[17]

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17. These proposals for structural change appear, for example, in the Ash Report on Selected Independent Regulatory Agencies ("A New Regulatory Framework") although they have received long-standing support from many other commentators. They are critically reviewed from the perspective of their ability to neutralize the bias in the regulatory process, by Lazarus and Olek, "The Regulators and The People", (1971) 57 Virginia L.R. 1069 ff).

Another proposal going to the internal functioning of regulatory agencies holds that a clearer definition of the goals and values which an agency must consider will, at least in part, ensure that more adequate conceptions of the "public interest" are developed.[18] The U.S. Court of Appeals in the leading decision, Scenic Hudson Preservation Conference v. F.P.C.[19] expressed the implications of this approach as follows:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

The proponents of reforms designed to increase citizen participation in the regulatory process, while conceding that a clearer definition of an agency terms of reference may be useful, contend that this will not be nearly enough. They argue that the emphasis of agency critics on agency structure is misconceived. The fundamental problem, so it is argued, is the integrity of the regulatory process. Once one recognises the essentially political character of most decisions made by regulatory agencies, the integrity of the process can only be assured by the adequate representation of all affected interests in that process. As in the political arena, and as for that matter in our judicial system, conflicting interests are best represented through an adversary process. Those who hold this view contend that it would be premature and unwarranted to embark upon a massive

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18. Reich op. cit. at 1248.

19. 354 F. 2d 608, 2nd Circ. 1965.

restructuring of our regulatory agencies before remedying representational deficiencies and evaluating the impact of new public inputs on the effectiveness of the agencies as trustees of the public interest. This view is bluntly put by Lazarus and Olek in rejecting the structural approach of the Ash Report:

> "We see the troubles of the federal regulatory system in a different light. We believe that the central problem with all regulatory agencies is their unresponsiveness to public concerns and not their lack of accountability to the highest levels of government."[20]

Commissioner Nicholas Johnson of the F.C.C. shares this scepticism of the value of structural changes. In calling for a new fidelity to established forms, he rejects any approach that would simply "shuffle the bureaucratic organization charts into new forms".[21] The most prominent of Johnson's proposals for upgrading the quality of regulation are those designed to increase citizen participation and advocacy.

(v) Conclusion

It is submitted that once one accepts that the regulatory process is an essentially political process, then whatever else may be desirable in terms of agency structure, it is intolerable that our political system should permit any substantially affected interest group to be, in practical terms, disenfranchised through denial of an effective voice in that process. Thus, without denying the importance of many of the other issues relating to questions of agency structure and formal political accountability, it is a fundamental premise of this paper that

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20. Lazarus & Olek op. cit. at 1070.

21. "A New Fidelity to the Regulatory Ideal", (1970) 59 Georgetown L.J. 869 at 893.

enfranchisement of all affected interests is indispensable to the integrity of the regulatory process. The problem of ensuring this has become an urgent one. It has become a truism to say that we live in a regulated economy. It is equally a truism to acknowledge that the future holds more regulation for us and not less. In a technological age when resolution of many of the most fundamental issues facing society depends initially on an analysis of technically complex facts, probably the major political challenge facing a developed democracy is how to ensure that government is accessible to the people and responsive to their wishes. As more and more functions of government are entrusted to bodies of "experts", often through the process of state regulation, the problem is increasingly transferred from government itself to its regulatory agencies. The problem we are confronting is a profound one, with the most fundamental implications for the future of democratic government. Until we have moved to meet it we must live with the outrageous cynicism reflected in the well-known remark of U.S. Attorney-General Richard Olney in 1894 allaying the fears of the president of the Burlington Railroad distressed by the creation of the Interstate Commerce Commission:

> "The Commission is or can be made of great use to the railroads. It satisfies the public clamor for supervision of the railroads, at the same time that the supervision is almost entirely nominal. Furthermore, the older such a commission gets to be, the more inclined it will be to take the business and railroad view of things. It thus becomes a sort of barrier between the railway corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests. The part of wisdom is not to destroy the Commission, but to utilize it".[22]

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22. Quoted in M. Josephson, "The Politicos", (1938) at 526.

In the 80 years since this prophecy was made it has been more than amply borne out. 80 years is also long enough to start upon the task of formulating responses which confound this piece of political philistinism. The proposals examined later in this paper are attempts to suggest possible forms that these responses might take.

II MECHANISMS FOR PUBLIC PARTICIPATION

Existing responses, as also with most potential responses, to the problem of increasing consumer input into the regulatory process fall into two categories: (a) those which seek to facilitate the voluntary participation in regulatory proceedings of individual citizens or groups of citizens; (b) those which seek to institutionalize a consumer input by providing structured bodies to speak and act on behalf of the consumer interest.

(1) The Non-Institutionalized Approach

Traditionally, one of the initial obstacles facing citizens wishing to participate in regulatory proceedings has been the question of standing. Do they have a legally recognizable interest in the matter in issue? Particularly in situations where the interest was not directly of an economic character, e.g. an interest in preservation of the environment, U.S. courts in early decisions denied citizens a right to standing. However recent cases have shown a marked tendency to liberalize standing rules.[23] Summing up the effect of these cases, Cramton says that now "there is little serious disposition in federal agencies to preclude public participation in their proceedings",[24] except in enforcement proceedings where citizen participation has only rarely been permitted.[25] Anglo-Canadian case-law does not reflect the same developments, and still, as a general rule, a party, in order to

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23. See e.g. Office of Communications of United Church of Christ v. F.C.C. 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966); Scenic Hudson Preservation Conference v. F.P.C. 354 F. 2d 608 (2nd Circ. 1965) cert. denied 384 U.S. 941 (1966); National Welfare Rights Organization v. Finch 139 U.S. App. D.C. 46; 429 F. 2d 725 (1970).

24. Op. cit. at p.

25. See generally Note, Citizen Organizations in Federal Administrative Proceedings: The Lingering Issue of Standing 51 B.U.L. Rev. 403 (1971).

receive standing, must show that he is specially aggrieved by the issue, in the sense that he specifically stands potentially to be more greatly affected by the outcome of the issue than citizens at large.[26]

Another formal problem is the question of notice of pending proceedings. In the U.S., in adjudicative proceedings all known parties are notified but this obviously does not extend to diffuse public interest groups. In rule-making proceedings, the Federal Register carries notice of pending proceedings, but this is not every citizen's idea of a vade mecum. In Canada, notice of pending regulatory proceedings appears in Government Gazettes. It has been suggested that the problem of realistic notice is met partly by virtue of the fact that larger consumer and citizens organizations already do watch the Federal Register, by in future requiring agencies to give specific notice of proceedings to interested or affected organizations, and in the case of some industries, such as the communications industry, by requiring notice of proceedings to be published over the media affected by the proceeding.[27]

However, as Cramton points out, the issues of standing and notice are minor issues relative to the question of the resources needed to make an effective case once participation is assured. The scale of this problem has been indicated earlier. Obviously the only solution to it is the subsidization in one form or another of the participation.

Cramton suggests that expert witnesses could be provided directly by the government from its own personnel where no conflict of interest is entailed or otherwise indirectly simply by paying their fees.

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26. See generally, Thio, Locus Standi and Judicial Review, Singapore University Press, 1971.

27. See Reich, op. cit. at 1258 and Johnson, op. cit. at 880, 881.

He suggests that transcripts should be made available at cost and that in relation to attorneys' fees, these be dealt with either as any other problem of legal aid is dealt with or through the provision of legal staff within each agency to represent citizens without the means to secure their own advocates. The only U.S. regulatory agency as yet to recognise responsibilities in this area is the F.T.C. which recently ruled that an indigent respondent was entitled to have legal representatives supplied at the Commission's expense.[28] Following this ruling, the Commission asked the Comptroller General whether in addition it may pay witness, transcript and out-of-pocket expenses incurred by indigent respondents or public interest intervenors in agency proceedings. It is understood that the Comptroller General has recently authorised the payment of these expenditures.[29] Lazarus and Olek argue that as an alternative to government financing of these resources, the regulated industries could be assessed general fees large enough to cover the cost of public participation, or simply be required to pay the costs of this directly in the particular proceedings where it occurs. In both cases, these costs would presumably be passed on to the customers of the regulated industries, including usually the intervenors.

However, even if one assumes that the material costs of non-institutionalised intervention can be met, a number of serious problems remain with this form of public participation. Firstly to the extent that material assistance is left within the gift of the agency before whom intervention is sought, the intervenors have no practical right to appear and their lack of independence from the agency may inhibit them in criticizing agency policy. But, much more fundamental than this is

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28. American Chinchilla Corp. 1970 Trade Reg. Rep. No. 19059.

29. Reported in The New Republic, Aug. 19, 1972, p. 8.

the question of whether non-institutionalised participation can ever provide the consistently forceful advocacy of the consumer interest that that interest requires. As many commentators have pointed out, popular sentiment is generally only aroused in this context when something approaching a scandal or outrage occurs which generates a public demand for a change in the law or a new regulatory regime. But after this initial demand is met, the low visibility, unspectacular, unglamorous, day-to-day regulatory grind is not likely to continue to attract a sharp popular focus, and the concern that coalesced when the system of regulation was initially implemented tends quickly to dissipate. It is assumed that the matter has been taken care of. Even removing entirely the problems of standing and financing participation, usually an individual citizen's direct stake in an issue will be so small that even financially costless effort on his part to participate either singly or in a group in agency proceedings will not be worth the effort. Indeed many issues will be such that almost no significant number of consumers at a given point of time have any stake in the issue at all. An example cited to the writer by a Congressional Committee staff member from his personal experience well illustrates this. The staff member had recently had airconditioning units installed in his house, and contrary to his expectations, was advised by the installers that he could not, even with heavy duty flex, plug the set into a normal outlet, but instead needed to have holes punched in his walls in order to have an apparently lighter flex run through the walls to the main. The staff member speculated to the writer that at the time that the municipal body which fixed the building and electrical by-laws in the area laid down standards on this point, only the electricians' association made submissions and as a result unrealistic and unduly expensive standards

were adopted. As the staff member pointed out, at the time that the standards were set, he could not reasonably have foreseen that the matter might be of future interest to him and had no incentive whatever to participate then in the standard setting process.

Moreover, even where citizen participation is present in regulatory proceedings, another factor tends to affect the weight attached to it. Either in fact or at least in the eyes of the agency or other affected interests, the citizens participating may be community activists whose views are not representative of the community at large and as a result they are taken less seriously. Indeed whether or not they are properly so characterised, no citizen or group of citizens can or should be regarded as representative of consumer interests at large. As we shall see, the consumer interest is not homogeneous. Yet to conclude from this that an agency should regard voluntary citizen participants as speaking only for themselves largely revives the whole problem again. In order to give the interests of consumers their proper weight in agency deliberations and recognizing the reasons why most consumers will not find it worthwhile to intervene personally, something in addition to sporadic voluntary citizen participation is obviously called for.

Thus the principal objection to assisted non-institutionalized public participation in the regulatory process as the sole response to the problem of imbalance in the representation of interests is its highly erratic,random and unrepresentative character. Consumer interests deserve more consistent and rational representation than this.

(2) Institutionalized Public Participation

(a) Early Experiences

Attempts in the U.S. to institutionalize a consumer presence in government dates back to 1934. In that year, the Consumers' Counsel was established in the Agricultural Adjustment Administration, the Consumer

Advisory Board within the National Recovery Administration and a consumers' division in the National Economic Council. Later in the 1930's, a Consumers' Council in the Bituminous Coal Commission was established, a Consumer Division of the Office of Price Administration during World War II, a National Consumer Advisory Committee under the Office of Price Stabilization during the Korean War, and a National Consumer Advisory Council under the Council of Economic Advisers in the early 1960's. In 1964, the President's Committee on Consumer Interests was created and the position of Special Assistant to the President for Consumer Affairs was created by executive order.

In the past decade some agencies, e.g. the C.A.B. and the U.S. Post Office have also experimented with an office of staff witness to present briefs on behalf of the consumer interest. In 1970, the New York State Public Service Commission established within itself a staff office to represent the consumer interest in proceedings before the Commission, e.g. telephone rate hearings.[29]

In Canada, a Federal Department of Consumer and Corporate Affairs was created in December, 1967, and in 1968 the Canadian Consumer Council was formed.

Several points may be made about these institutional forms of response to the need for consumer participation in government or government regulation. First, many of the bodies cited were, or are, simply advisory bodies to government or arms of government, and are not intended to stand apart from the body they are advising as a detached critic. Secondly, because they are often appointed by the

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29. David Swankin, Washington Representative for Consumers Union of U.S.A., Testimony to Subcommittee of Committee on Gov't Operation, 91st Cong., 1st sess. Sept. 18, 1971, H.R. 6037, p. 185; and 91st Cong, 2nd sess. April 13, 1971, p. 67.

body they are advising or appearing before, they lack the independence to adopt an aggressively critical posture toward it. Thirdly, these consumer institutions are very much of an *ad hoc* character, operating in relation to particular commissions or agencies, and are not an implementation of some larger concept whose implications have been thought through and rigorously analysed. The *ad hoc* almost desultory nature of these miscellaneous responses has meant that there has often not been any clear policy on questions such as appointment procedure, composition, functions and powers. For example in the case of the two Canadian bodies, the Department of Consumer and Corporate Affairs has some regulatory functions, e.g. under the *Hazardous Products Act*, *Consumer Packaging and Labelling Act*, and *Combines Investigation Act*, yet also acts as an advocate for the consumer in the limited sense that it mediates complaints with merchants on behalf of consumers and undertakes consumer education programmes. However, it has no formal advocacy role before any regulatory agencies, least of all itself, and is presided over by a Minister who, as a member of the government, is bound to consult all interests and not merely those of consumers. Even the Canadian Consumer Council has never been able to adopt the role of partisan advocate for the consumer interest either generally or before regulatory agencies. All of the members are appointed by the Minister of Consumer and Corporate Affairs. Many of them represent business or interests other than those of the consumer. The Council is totally dependent on the Minister for funding and has tended to be used as a quasi-confidential advisory group to him. Certainly it has never taken the view that it was entitled to be publicly and aggressively critical of the government.[30]

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30. See J.S. Ziegel "*Guidelines for the Consumer Council*", Toronto Globe and Mail, March 20, 1971.

From this highly miscellaneous experience with institutionalized consumer inputs into government or regulatory decision-making, a new and much more general concept of consumer advocacy has begun recently to evolve. The focus of the debate has been in the U.S., but reference has occasionally been made to the concept by senior political leaders in Canada and the character of the two economies, as they bear upon the consumer market-place, is sufficiently similar for the U.S. debates to be of immediate and serious interest in Canada.

(b) The Concept of the Consumer Advocate Emerges

The first attempt in the U.S. to generalize a concept of an institutionalized consumer advocate is attributed to Senator Estes Kefauver who in 1959 and thereafter annually until his death in 1963 introduced bills in the U.S. Senate to form a separate Cabinet level Department of Consumer Affairs. This Department was to have five principal functions: (1) representation of the consumer in government policy-making (2) representation before Federal courts and regulatory agencies (3) provision for an annual consumers conference (4) dissemination of consumer information and complaints, and (5) general economic studies.

After Senator Kefauver's death, Congressman Benjamin Rosenthal of New York adopted this idea, and beginning in 1965, introduced a series of bills for the creation of a Department. One significant difference from Kefauver's concept was that the Department that Rosenthal proposed, in addition to its advocacy functions, was given some major regulatory functions. For example, the bills contemplated that the Fair Packaging and Labelling Act, the truth-in-lending provisions of the Credit Protection Act, the grading and classification functions of the Department of Agriculture and the standard-setting functions of the

Department of Health, Education and Welfare under the Food, Drug and Cosmetics Act would all be transferred to the new Department.[31]

This concept of a Government Department of Consumer Affairs attracted criticism from consumer spokesmen (inter alia). Congresswoman Florence P. Dwyer (R - N.J.) in Congressional Committee hearings in 1969 cited approvingly the reasons given by Ralph Nader for the lack of effectiveness of a Department discharging both advocacy and regulatory functions:

> "I do not find persuasive ... the depositing of various regulatory functions including the transfer of several consumer laws from other departments and agencies to the proposed Department. Giving the Department of Consumer Affairs such a regulatory role would (a) simply refocus the entire lobbying environment on the Department; (b) weaken the Department's strong advocacy role because it would have to referee between competing interests in the administrative hearings and rule-making roles; (c) further lighten any public interest burdens from other departments and regulatory agencies and (d) generate [hostility from the agencies because of the prospect of] losing their programs. To be effective a consumer agency must not have anything to give to industry or commerce, as it most assuredly would if it had a regulatory role. Having something to give would attract the same forces that undermined or controlled other agencies. The thrust of a consumer agency, in my judgment, is to assist in the reform of other agencies to perform in the public interest not to progressively relieve them of that horizon in their deliberations."[32]

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31. Note, "Consumer Protection Legislation: Another Consumer Fraud?", (1971) 60 Georgetown L.J. 113 at 116, n. 14; Report of the Senate Committee on Government Operations, Consumer Protection Organization Act 1972, June 1972, pp. 2 & 3; and e.g. H.R. 6037, Subcommittee of Committee on Gov't Operations, 91st Cong. 1st sess., September and November 1969, pp. 809.

32. Subcommittee of Committee on Gov't. Operations, H.R. 91st Cong., 1st sess., H.R. 6037, September and November 1969, p. 66.

Nader himself in testimony in the same hearings reinforced these points:

> "Even if we put the regulatory powers in one department, the department cannot be a full advocate or partisan for the consumer cause. Why? Because the department has to observe the procedures, the administrative procedures, the rulemaking principles that in effect grant all kinds of interests the right to represent themselves. And the Department has to take into account a whole range of due process and other appropriate interests, even if it is called the Department of Consumer Affairs. Now, I think it is about time the Government had an agency that did not have to referee and did not have to trade off, that simply was a tough, hard advocate of a partisan, consumer position."[33]

David Swankin, Washington Representative for Consumers Union of the U.S.A. Inc. opposed such a Department of Consumer Affairs for the same reasons:

> "With regard to the regulatory functions, we believe a choice needs to be made between administering and monitoring ... Basic to our reasoning is our belief that virtually all regulatory activity directly affects consumers. Rather than administer a few consumer laws, the [Consumer Advocate] would have a far greater impact if he monitored all. Moreover, it is the agencies that administer the collective body of consumer law that are on the visiting list of the special interest groups so prominent in Washington, D.C. Rather than merely giving the lobbyists a new address, it would be better to give the regulatory agencies a new lobbying group to contend with."[34]

As a result of these criticisms, and with the assistance of Nader and other consumer representatives, Rosenthal revised his 1969 Bill and re-introduced the bill as revised in 1970.[35] This Bill followed

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33. Ibid. at p. 184.

34. Ibid. at p. 189.

35. Hearings before Subcommittee of Committee on Gov't. Operations, H.R. 91st Cong., 2nd sess., H.R. 6037 (Revised), April 1970, pp. 2ff.

closely a bill passed in the Senate in late 1969 (S. 1177) by a vote of 74-4. It provided for the creation of an independent agency within the executive branch of government with a Director appointed by the President, by and with the consent of the Senate. No regulatory function would be vested in the agency, its principal functions being advocacy of consumer interests before Federal regulatory agencies. At the same time as Congressman Rosenthal introduced this bill in 1970, Congresswoman Dwyer reintroduced a bill from the previous year[36] providing for the creation of a statutory office for Consumer Affairs in the White House. This Office would co-ordinate Federal consumer protection activities and also act as consumer advocate before regulatory agencies. At this time also, the Administration introduced a bill of its own (H.R. 14758). This bill would have established a statutory Office of Consumer Affairs in the White House to co-ordinate Federal Government consumer protection programs and established a separate Consumer Protection Division within the Department of Justice to undertake an advocacy role before regulatory agencies. A final variant was a bill presented to the House of Representatives in 1971 by Congressmen Erlenborn and Brown which would have created a statutory Office of Consumer Affairs in the White House to perform co-ordinating functions and a Bureau of Consumer Protection within the Federal Trade Commission to perform advocacy functions before Federal regulatory agencies.

The Dwyer Bill attracted little support because of widespread fears that a Consumer Advocate located within the White House would be exposed to considerable political pressures either indirectly from

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36. H.R. 13793, ibid. pp. 44 ff)

businesses seeking to avoid confrontations or directly from the Administration seeking to avoid challenges to, or criticisms of, the policies of government or its agencies. The Administration Bill, while attracting less criticism, also did not gain wide support. A major difficulty with locating a Consumer Advocate within the Justice Department is that the Department administers some important consumer statutes itself, e.g. anti-trust laws, and prosecutes on behalf of other agencies for violations of their statutes or orders. Thus, the exercise of these explicit or implicit discretions by the Department would be a major concern of the Advocate. However, if he was hired by the Department and accountable to it, he would lack the detachment and independence to exercise a credible surveillance function in relation to his own Department. Moreover, as an employee of the Department, he would lack the stature and visibility necessary for full effectiveness. Finally, the Department, as part of the Administration, would be vulnerable to political pressures which could not help but impinge on the Advocate in the performance of his functions. Similar objections were voiced to the Erlenborn-Brown Bill, and while the Administration initially supported it as the next best solution to their own, by now widespread bi-partisan support had coalesced around the concept of an independent executive agency with a Director appointed by the President and the consent of the Senate having only advocacy and not regulatory functions to discharge.

Rosenthal's H.R. 6037 (Revised) was again the subject of hearings in 1971.[37] This bill, with a number of amendments, was reported out of

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37. As H.R. 16, Hearings before a Subcommittee of the Committee on Gov't. Operations, R.R. 92 Cong., 1st sess. April, May, July, 1971.

the House Committee on Government Operations on September 23rd, 1971, and now with Administration support, was passed by a vote of 344-44 by the House of Representatives on October 14. The concept of the Consumer Advocate as it had envolved since Senator Kefauver's original bills was now relatively clear and widely supported. The problems that remain, as at the time of writing, in the way of a reconciliation between the Senate and the House and their respective bills (S. 1177 and H.R. 10835) relate solely to the powers that the Consumer Advocate is to be invested with, although perhaps surprisingly this issue has generated more bitter and emotionally charged debate than any other in the 13 year history of the evolution of the legislation. As of the time of writing, the Senate Committee on Government Operations has just reported out a compromise bill (S. 3970) which many observers believe will clear the way for final passage of a Consumer Advocate bill by both Houses before the end of 1972. One of the more modest estimates of the resources that would need to be placed at the Consumer Advocate's disposal is an annual budget of $7.25 million, which would support a staff of 300.[38] The new Senate Bill (S. 3970) on the other hand contemplates that by 1975 the annual budget of the office would be $25 million.

In the next section of this paper, we will examine general objections that have been raised to the concept of the Consumer Advocate and then proceed in the final section to examine particular questions that have arisen as to what powers he should be invested with.

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38. Report of the Committee on Gov't. Operations, H.R., 92nd Cong., 1st sess., No. 92-542, September 30, 1971, p. 20.

III AN OFFICE OF THE CONSUMER ADVOCATE: CRITICISMS OF THE GENERAL CONCEPT

A great deal of bloated rhetoric has been uttered in recent public debates over the Consumer Advocacy legislation. In a circular to its members in 1971, the Chamber of Commerce said that Rosenthal's bill (H.R. 16) would help "destroy the free enterprise system", although in earlier Congressional hearings they had described it as a "thoughtful bill". The Grocery Manufacturers of America described the same bill to its members as "one of the most blatant anti-business bills ever introduced."[39] The National Small Business Association became even more excited. In a Congressional Committee brief, the Association said:

> "Programs set forth by the international consumer movement in seeking to substitute a "co-operative" society for our "free enterprise" society are easily recognized by the legislation pending before this subcommittee today. A campaign to make the business community look as though it operates only in order to steal from the poor has been successful ... Much that is being proposed today is based upon experience in countries dominated by the co-operative consumer movement. The blueprint for taking over private enterprise has been prepared. It is now being followed. Among the ultimate effects of these proposals would be the destruction of the need to advertise, elimination of brand names, and altering or destroying much of the media ..."[40]

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39. See Rosenthal, Hearings before a Subcommittee of the Committee Gov't. Operations, 92nd. Cong., 1st sess., H.R. 16 etc., April, May, July, 1971, p. 131.

40. Hearings before a Subcommittee of the Committee on Gov't. Operations, H.R., 91st. Cong., 2nd Sess., H.R. 6037 (Revised), April 1970, p. 117.

Among the more rational and specific criticisms of the concept of the Consumer Advocate to emerge during Congressional Committee hearings are the following:

(i) It is said that the concept of a Consumer Advocate will lead to confrontation politics, government by battle, administrative guerilla warfare, the "politicalization" of many simple acts of daily life, and the destruction of the "natural alliance" between business and consumers.

It is true that integral to the concept is acceptance of an adversary system of decision-making. However, we have always accepted this as a cardinal pillar of our judicial system. More importantly, the very nature of a free market economy demands it. Healthy confrontation is a necessary part of arriving at a freely negotiated bargain. The seller is striving to give the least for the most and the buyer to get the most for the least. There is no "natural alliance" between business and consumers, except to the extent that they both wish to preserve this economic system. But within this system, the interests of the two are naturally antipathetic. It is in the interests of each to maximize his benefits at the expense of the other. Many forms of market regulations were introduced precisely because this healthy confrontation was not occurring in the market place, i.e bargaining power had become unequal. To the extent that the regulatory system has perpetuated this inequality because of lack of confrontation in the regulatory process, i.e. imbalance in representation power, the state has a responsibility now to provide mechanisms for adequate confrontation of conflicting interests, otherwise the original need for regulation goes unmet.

(ii) A closely related argument is that if the regulatory agencies are not doing their job, then they should be reformed, and if necessary given additional resources. However, as has been stressed previously in this paper and in (i) above, no matter how one restructures the agencies or what funds one gives them, once it is accepted that an adversary system is as essential to the integrity of the regulatory process as it is to the judicial process, the argument ceases to have any relevance to the issue.

(iii) It is argued that there is no reason to suppose that the fate that has apparently befallen other regulatory agencies will not also befall the Consumer Advocate Agency, and that the factors that reduce the efficiency of any bureaucracy over time will equally reduce the level of performance of the Consumer Advocate. Thus a new agency will have to be created to monitor and criticize the activities of the Consumer Advocate and so on ad infinitum. Congressman Brown in committee hearings summed up this objection by citing comedian George Burns, "Who watches the watchman's daughter while the watchman is on the watch?"[41]

Firstly, this objection necessarily has a sophistical aspect to it. One might as easily ask whether there should be a court to hear appeals from mistaken decisions of the highest appellate court in a jurisdiction, or an ombudsman to monitor the activities of the ombudsman who is monitoring the activities of government. Inevitably, and for pragmatic reasons alone, the buck always have to stop somewhere.

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41. Hearings before a Subcommittee of the Committee on Gov't. Operations H.R., 92nd Cong., 1st sess., H.R. 16, 3809, 254 & 1015, April, May, July, 1971, p. 371.

Secondly, the Consumer Advocate Agency is not like other agencies. As Ralph Nader has pointed out, because it has no economic largesse to give away in the form of rates, routes, licenses, subsidies or other benefits, it will not attract the pressures that have led to the "taming" of other agencies by the interests being regulated. Thirdly, because consumer advocacy functions will be concentrated in the one agency and will not be diffused through ad hoc mechanisms in individual agencies or left only to sporadic citizen initiatives, the Consumer Advocate will have a very high visibility and will attract a very critical public focus from politicans, the media and the organized consumer constituency. It is probably true that in any bureaucracy of any size, activities after a time become, to some extent, routinised. Effective organization demands some structure and the line between organizational structure and a hardening of the bureaucratic arteries is a fine one. Whether a movement from the former to the latter is in the nature of the bureaucratic process is a moot question. However, it should be recalled that the Consumer Advocate Agency will not be large by modern governmental standards, will have limited resources which will require constant re-evaluation of priorities, can probably ensure a sufficient turnover of staff to provide for a constant input of new ideas, and because its mission will be to be combative, is unlikely to find itself out of the political firing line long enough to become complacent.

(iv) It is argued that administrative processes before regulatory agencies are already excessively prolix and legalistic and that the tendency to over-judicialization of proceedings, with an emphasis on form rather than substance, will be aggravated by the creation of an office of the Consumer Advocate with wide-ranging powers to intervene as a party in regulatory proceedings.

This point has some force. It is true that administrative processes have often become very long-drawn out, cumbersome and inefficient, but considerations of expediency do not seem an adequate justification for countenancing a systematic lack of balance and fairness in the regulatory process. The further procedural inconveniences that the Consumer Advocate's presence is likely to engender have simply to be regarded as one of the costs of achieving this goal.

(v) Perhaps the most telling argument against the Consumer Advocate concept is that often the consumer interest is so fractured that the Consumer Advocate could not reasonably know which position that he might advocate would best advance the consumer interest. A spokesman for the U.S. Chamber of Commerce put the point as follows:

> "... The consumer is not just a consumer. He is also a wage-earner, a taxpayer, and very likely a husband and father. He plays a variety of different economic and social roles and what may appear to serve the interests of one of those roles may not serve his own interest equally or even at all.
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> To establish an agency ... with the avowed purpose of being a blatant partisan lobby for consumer interests would be to reflect a two-dimensional view of humanity contradicted by decades of sociological research. The interests of consumers should be represented but in a way that takes full account of the rich abundance of roles filled by each of us as individuals acting out our varied daily lives...
>
> The consumer interest is not a single over-riding interest. There is no one single consumer interest. The interests of the elderly consumers will differ considerably from the interests of young consumers; the interests of rural consumers may differ from urban consumer interests...
>
> To provide one agency as a partisan spokesman for consumers ... is to invite strenuous lobbying because there is no single over-riding consumer interest. Varying groups of consumers would use

> a partisan consumer agency to lobby for their own special interests."[42]

Examples said to illustrate these situations are as follows:

(1) Do consumers want cheap electricity or an environment without overhead wires, coal smoke from coal-fixed generators, or thermal pollution from atomic energy plants, or what particular mix of factors would they consider a satisfactory trade-off of costs and benefits?

(2) Do consumers want safer (how much safer?) cars or cheaper cars?

(3) Do consumers want cheaper goods through a free trade policy or job security produced by high trade tarriffs?

(4) To what extent, if at all, should urban users of utilities, e.g. telephone services, subsidize rural users?

Where does the consumer interest lie in these four situations? Can one single interest be identified?

There are a number of points to be made in response to this line of criticism. Firstly, it would be a devious tactic to use these difficult cases as justification for the proposition that there should be no consumer inputs into the regulatory process at all, and that the status quo should be preserved. A more constructive and less cynical conclusion than this is obviously called for. Secondly, some of these difficulties can be minimised if the Consumer Advocate is required to consider only consumer interests. The larger and more diffuse his focus

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42. Hearing before a Subcommittee of the Committee on Gov't. Operations, H.R. 91st Cong., 2nd sess., H.R. 6037 (Revised), April, 1970, pp. 56 and 57; cf. Ralph E. Winters, "The Consumer Advocate versus The Consumers, American Enterprise Institute, 1972.

the more likely it will be that there will be difficulty defining the position he should take on particular issues. In other words, the Consumer Advocate should not be required to consider a citizen's interest in the environment or interest as an employee. These other dimensions of a citizen should be left to be advanced by other interest groups or representatives. The argument that this implies a one dimensional view of a person is not compelling. Where an airline applies for an increase in its fare structures, its executives see themselves only as producers and disregard the impact of such a policy on them as potential passengers. When a union bargains for higher wages for its employees, it ignores the impact that higher wages will have on prices and thus on the position of its members as consumers. Nor are unions in the automobile industry going to argue that public transit should supercede the automobile in the city to protect the interest of its members in a clean urban environment. However, all this is not to say that the Consumer Advocate will not have to mix a measure of pragmatism with a single-minded pursuit of the consumer interest. For example, in the free trade v. high tarriffs example, it would obviously not be politically credible for the Consumer Advocate to take the position that all tarriffs should be abolished. To the extent that it would be counter-productive for him to take eccentric positions through a mindless and total disregard of the implications of those positions for a citizen in capacities other than that of consumer, the Consumer Advocate will have to balance interests in deciding what position he will take. Thirdly, in those cases where even though his perspective is only that of the consumer, different groups of consumers <u>qua</u>

consumers are differently affected by an issue, the problem for the Consumer Advocate would not seem insoluble. For example, in the example where a major new safety feature would add a substantial sum to the price of new cars, poor and wealthy consumers may well see the trade-offs required differently. In cases such as this, where these are two clearly defined consumer positions on the issue, the Consumer Advocate could represent the most prevalent position and brief out to outside counsel the job of representing the minority position, or if the positions are of approximately equal strength, brief out both cases so that he should not seem to be discriminating between the two by lending his status and prestige to one and not to the other. Where the consumer interest is so hopelessly fragmented that no positions seem to reflect substantial consumer support, the Consumer Advocate probably should not intervene, directly or indirectly, at all.

However, these difficult situations should not be allowed to obscure the fact that in the vast majority of cases in which the Consumer Advocate will be interested, there will be no serious difficulty in determining where the predominant consumer interest lies. If one reflects back over the great consumer issues of the last few decades, in almost all cases the consumer interest was clear, and whether the issue was unsafe drugs, unsafe cars, hazardous products, contaminated food, disclosure of true interest rates, fair credit reporting, restrictions on harsh credit collection methods, deceptive sales practices, fair packaging and labelling, manufacturers' warranties, better access to the legal system, etc. etc., the consumer interest in each case was clearly identifiable. A proper measure of pragmatism and an intelligent sense of discretion should enable the Consumer Advocate to cope with those situations in which it is not.

(vi) Another argument, made both by some business and consumer spokesman, is that the Consumer Advocate, because of his status and resources, will come to be regarded as the only authentic voice of the consumer in government, and the voluntary consumer groups which have gathered impressive strength over the past decade or so will lose much credibility. The result will be an artificially monolithic view of the consumer interest. This, apart from failing accurately to reflect the realities, would also carry certain political risks because the entire fortunes of the consumer movement would be riding on the success or failure of this institution.

The answer to this argument would seem to be firstly, that the Consumer Advocate, for most of his time, would be doing a job that is not done at all at present by voluntary consumer groups, i.e. appear before regulatory agencies. Secondly, many consumer groups feel that they will be able to be more effective with such an institution, because instead of having to diffuse their concern over a range of agencies and institutions, they will instead be able to direct their focus primarily to the Consumer Advocate, monitor his activities, and bring pressure to bear on him when necessary.

(vii) It is argued by some consumer critics in the U.S. that a Consumer Advocate who is appointed by the President, even with the consent of the Senate, will lack the independence necessary "to criticize publicly other officials and institutions for whose performance the President is also responsible".[43] Commissioner Nicholas Johnson also

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43. Lazarus and Olek, "The Regulators and the People", (1971) 57 Virginia L. Rev. 1069 at 1104.

entertains this fear: "Public interest lawyers within the governmental structure simply would be too vulnerable to the more venal influences of politics and special interests to represent the general public adequately."[44]

Others reply that there are sufficient checks and balances, formal and informal, built into this form of Presidential appointment that the political costs of attempting to appoint a political "patsy" to the office would be too high to warrant the attempt. Indeed, one independent critic worries that the Consumer Advocate could become so independent that he assumes an existence of his own, that "an advocacy agency may become its own client in the sense that the continuance and furtherance of the institution itself would become one of its major goals."[45]

On the whole, the question of independence from government, provided that the President is required to appoint with the consent of the Senate, has not occasioned widespread concern. In Canada, where the checks and balances of the U.S. Presidential system of government are not present, the question of assuring an independent appointment presents more difficulties.

One solution might be for the government to appoint an Advisory Council consisting of representatives of organized consumer groups and others with an expertise and interest in consumer problems which would make recommendations to the government on appointees to the Office of

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44. Op. cit. 897, 898.

45. Roger Cramton, Chairman U.S. Administrative Conference, "The Why, Where and How of Broadened Public Participation in the Administrative Process, (1972) 60 Georgetown L.J. 525 at 546.

Consumer Advocate. The government would be required to appoint for a term, dismissable only for cause, a person who had the endorsement of the Council. A commitment of funding for his period of office would also be necessary not only to permit rational planning of priorities but also to prevent threats of cuts in budget appropriations being used as a form of political pressure. This method of appointment would seem preferable to one sometimes mooted, where the appointive function is delegated entirely to such a Council.[46] In this case, it would be too easy for a government or its agencies to dismiss the policy positions of the Consumer Advocate as those of a maverick for whom the government is in no way answerable.

(viii) A related fear about the Consumer Advocate is that he will not be sufficiently accountable to his consumer constituency.

Obviously it is not practically possible for the Consumer Advocate to be elected by all consumers in the country. However, it is submitted that an acceptable approximation to this may be achieved if his initial appointment was required to be the subject of a recommendation by an Advisory Council, hopefully widely representative of consumer interests in terms of issues, viewpoints and geographic regions of the country and if the same Council also acted on an ongoing basis in bringing matters to the attention of the Consumer Advocate, helping chart priorities and developing policy directions. Furthermore, individual consumer complaints, presently forwarded to a variety of government departments or agencies, could in future be cleared through

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46. Cf. Senator Philip Hart, Hearings before a Subcommittee of the Committee on Gov't. Operations, U.D. Senate, S. 1177 and H.R. 10835, 92nd Cong. 1st sess., November 1971, pp. 4ff.

him. This would enable him to keep close to "grass roots" consumer problems and to identify patterns in complaints which would assist him in shaping more general priorities and policies.

Finally, because the Consumer Advocate can and should expect to be challenged in regulatory proceedings as to the representative character of his views, there may be occasions when it will be useful for him to run surveys or studies that establish a statistical indication of consumer viewpoints on an issue. However, a note of caution has to be registered here. Counting heads in many cases will be unrealistic, precisely because of the complex and technical character of the regulatory issues. These require the resources and expertise of the Consumer Advocate's Office for adequate evaluation, and, because of this, are not easily evaluated by consumers at large, at least in survey form. If conceding this implies assigning a paternalistic role to the Consumer Advocate in some cases, then a charge of paternalism may simply have to be accepted. The role of the State in contemporary society has long passed the point where a paternalism - no paternalism debate, in those terms at least, is any longer meaningful.

(ix) A final fear sometimes raised about the Consumer Advocate is that the logic of the argument that justifies his appointment leads to the conclusion that other diffuse interest groups presently unrepresented in government decision-making processes, e.g. the poor, the old, the unemployed, the black, Indians, etc. should also have a similar institution placed at their disposal, and thus a government which acknowledges the validity of the Consumer Advocate concept is entering down a road without end.

Answers to this difficulty would seem to be, first, that consumers are a much larger group than these other groups and can justify a higher priority, and that in any event, there is always an element of arbitrariness in every government decision as to where it defines the limits of any social programmes. Secondly, it may be that up to a point we should accept the implications of this logic, and indeed we have. In Canada, governments have supported institutions or bodies who act as spokesmen for particular disadvantaged groups e.g. welfare recipients, Indians, etc. In the U.S., the Administrative Conference of the United States in 1969 recommended the creation of a "Poor People's Counsel" to represent the interests of the poor. And the Administration is presently sponsoring a bill to create an Indian Trust Counsel Authority to represent the interests of Indians before government.[47]

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47. Cf. Cramton op. cit. 545.

IV AN OFFICE OF THE CONSUMER ADVOCATE: THE DEBATE OVER HIS POWERS

The question of the powers to be given to the Consumer Advocate has, if anything, provoked more intense debate than the question of whether he should exist at all. The passage of H.R. 10835 through its Committee stages and then through the House of Representatives was accompanied by heavy lobbying and heated charges and counter charges as to the motives of those on different sides of the debate. Representative Rosenthal, the original sponsor of H.R. 10835, ended up voting against his own bill in Committee and on the floor of the House, claiming that weakening amendments adopted in Committee would make the Consumer Advocate a "sheep in wolf's clothing". Nader labelled the bill, as drafted, "a consumer fraud". Miss Virginia H. Knauer, Special Assistant to the President for Consumer Affairs, on the other hand, described the Bill as a "balanced and responsible proposal".[48] Chet Holifield, Chairman of the House Government Operations Committee which handled the bill, described it also as a "strong, effective, responsible measure ... The bill doesn't satisfy either Ralph Nader or the U.S. Chamber of Commerce but it will do a job for the American Consumer".[49]

The principal areas of dispute over the Consumer Advocate's powers can be readily isolated and will now be dealt with in turn. In dealing with these, comparisons will be made between H.R. 10835, passed by the House in 1971, H.R. 1177, passed by the Senate in 1970 and the new Senate Bill (S. 3970) adopted by the Senate Committee on Government Operations on September 8, 1972.

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48. The Progressive, November 1971, pp. 23 ff.

49. National Journal, 18/12/71 pp. 2499 and 2503.

(1) Which agencies should the Consumer Advocate be entitled to appear before?

After some early discussion, all three bills now reflect acceptance of the fact that provided the Consumer Advocate finds that the matter in question is likely to affect substantially the interests of consumers, no meaningful functional distinction can be drawn between the so-called independent regulatory agencies and executive bodies exercising regulatory functions within State Departments, e.g. the Food and Drug Administration within the Department of H.E.W. and the functions of the Department of Agriculture under the Meat Inspection Act. In Canada, also, some Government Departments exercise important regulatory functions pertaining to the consumer, e.g. the Department of Health and Welfare - Food and Drug Directorate, the Department of Consumer and Corporate Affairs - Hazardous Products Act, the Department of Transport - Motor Vehicle Safety Act. Thus no distinction is or should be drawn between independent regulatory agencies and government departments exercising regulatory functions and moreover no attempt is, or should be, made to define inflexibly which agencies or departments fall within the ambit of the legislation. Further, all three U.S. bills make it clear that government departments without direct regulatory functions but with enforcement functions, e.g. the Department of Justice, are within their ambit, at least, as we shall see, to the extent that the Consumer Advocate can petition them for the initiation of proceedings and intervene in enforcement proceedings. Finally, the Consumer Advocate should be entitled to present briefs to Parliamentary Committees or Ministers of Government on proposed or desired legislation.

(2) Should the Consumer Advocate be entitled to intervene as a full party in all agency proceedings, or should his role be that of amicus curiae only?

As a full party, the Consumer Advocate would be enabled to present evidence, call evidence in rebuttal, cross-examine witnesses, require discovery of documents, issue interrogatories, require notice of agency proceedings, and seek appellate review as of right. As an amicus curiae, the Consumer Advocate would merely be able to make a single written or oral submission to an agency.

An amendment to H.R. 10835 was introduced both in Committee and on the floor of the House to give the Consumer Advocate only an amicus curiae role but was decisively beaten. The arguments for the amicus curiae approach seems to be that in light of the novel and rather experimental nature of the concept of a Consumer Advocate, the more conservative role of amicus curiae would be a sound first step. His presence in proceedings would be less disruptive of agency business, the nature of his participation would be more limited so that resources would be conserved, and because of his limited powers, he would be allowed to intervene in any kind of proceedings without endangering considerations of due process.[50]

The arguments against an amicus curiae role are that the whole notion behind the idea of a Consumer Advocate is to put consumers on the same basis as other parties to agency proceedings and allow them via their Advocate to make the same level of input into the proceedings. Many agency proceedings involve highly complex technical issues and only

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50. See Additional Views of Don Fuqua, Minority Report, Report of House Committee on Government Operations on H.R. 10835, Sept. 30, 1971, pp. 31 ff.

through the full process of presentation of evidence, examination, cross-examination, discovery, etc. is the Consumer Advocate likely to be able to develop an effective case. Chet Holifield, Chairman of the House Government Operations Committee said: "To limit the Consumer Protection Agency's advocacy role to amicus curiae alone ... would tie one of the Administrator's hand's behind his back and make him come, hat in the other hand, to plead the consumer's cause."[51] Consumer spokesmen agreed that the amicus curiae amendment, if accepted, would "defang" or "gut" any Consumer Advocacy bill.

(3) Should the Consumer Advocate be entitled to intervene as a party in proceedings which seek "primarily to impose a fine, penalty or forfeiture" for breach of any statute or rule made thereunder?

H.R. 10835 denies the Consumer Advocate this right and instead allows him, in the discretion of the adjudicating court or agency, to appear only as an amicus curiae. S. 1177 is obscure on this point. S. 3970 (s.204(a)) allows the Consumer Advocate to participate as a party in any civil proceeding in a court of the U.S. involving the enforcement of a Federal agency action in which he earlier intervened where such action substantially affects the interests of consumers, or where he did not earlier intervene, he may still participate in enforcement proceedings unless the Court determines that this would be detrimental to the interests of justice. No limitations at all are placed on the kind of initial agency proceedings in which the Consumer Advocate can intervene.

This restriction in H.R. 10835 has been one of the bill's most hotly contested aspects. Unfortunately, the looseness of the wording of the

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51. Quoted in Memorandum on Amicus Curiae amendment prepared by the Staff of the Senate Committee on Government Operations, 1972.

clause has resulted in widely varying understandings of it, which in turn have unnecessarily exacerbated and confused the debates on the issue.

The argument in favour of the restriction is that in a criminal or quasi-criminal proceeding involving fines, penalties or forfeitures for violations of statutes, due process considerations and basic concepts of fair play dictate that a defendant not be exposed to dual prosecutors - the enforcement authority and the Consumer Advocate - both with full powers of cross-examination, subpoena, etc.

The argument against the restriction is that the consumer interest may be vitally affected by the kind of sanction a particular statutory violation attracts and that, furthermore, in enforcement proceedings often major points of law affecting the scope and meaning of a statute are in issue. If the restriction in H.R. 10835 was construed literally, so it is said, it would embrace cease and desist proceedings before the F.T.C. and other agencies, as well as license revocations. Indeed, perhaps any kind of prejudicial adjudication might be argued to be a penalty. The proponents of the restriction retort, firstly, that the restriction will have only the most limited effect on the Consumer Advocate's right to intervene in agency proceedings because very few agencies can themselves directly, without court assistance, impose fines, penalties and forfeitures, and, secondly, that "penalty" means monetary penalty and does not include cease and desist orders or revocation of licences.

The terms of S. 3970 will prevent the Consumer Advocate from intervening as a party only in criminal proceedings i.e. proceedings requiring to be initiated, under the criminal law, by a criminal indictment rather than by a civil information. In these cases, he

cannot intervene at all, even as an amicus curiae.

One may question whether S. 3970 entirely resolves the question simply by adopting traditional and rather formal distinctions between criminal and civil enforcement proceedings. Surely, there may be cases where violations of a non-criminal statute will attract fines at least as serious as the punishment likely to be imposed under a statute formally characterized as "criminal" in nature. In Canada, in fact, the destinction between criminal and civil enforcement proceedings for for violations of the law is not known. Provided "penalty" was defined more tightly (so as to give clear effect to what defenders of the Bill now say was only to be encompassed by the clause), one might legitimately question the substance of consumer critics' objections to this particular restriction in H.R. 10835.

(4) What rights of access should the Consumer Advocate have to information (a) from the agencies (b) from business

(a) Information from Other Agencies

H.R. 10835 (s. 202(c)(2)) provides that each Federal agency is authorized and directed, except where prohibited by law, to furnish or allow access to all information in its possession which the Consumer Advocate may determine to be necessary for the performance of his functions. S. 1177 authorizes each agency to make such information available "to the greatest practicable extent consistent with other laws" (s. 206(a) and (b)). S. 3970 follows the terms of H.R. 10835 except that it denies the Consumer Advocate access to:

(i) information classified for security purposes;

(ii) policy recommendations by agency personnel intended for internal agency use only;

(iii) information concerning routine executive and administrative functions which is not otherwise a matter of public record;

(iv) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(v) information which an agency is expressly prohibited by law from giving to another federal agency (s. 207(c)).

The only exclusion that perhaps warrants comment here is (ii). The Report which accompanies the bill states that the committee recognized the importance of full and frank presentation of opinions by agency personnel in the development of an agency position (p. 48). Thus the emphasis is on the word "recommendation" as opposed to decision, position or ruling and as such seems justifiable. Even with these limitations, the Consumer Advocate has very wide powers of access to agency information which, of course, he must have if he is to function effectively. Because S. 3970 most precisely defines the Consumer Advocate's rights in this regard, it seems the preferable formulation of the three bills under discussion.

Two of the three bills deal specifically with the question of ensuring that the Consumer Advocate obtains notice of pending proceedings. H.R. 10835 (s. 302) requires every agency taking any action which may substantially affect the interest of consumers (not being confined to formal activities) to notify the Consumer Advocate when notice of the action is given to the public or when notification is requested by him. S. 3970 (s. 205) requires that an agency considering any action which may substantially affect the interests of consumers must on the request of the Consumer Advocate notify him of the action when public

notice is given. In addition, upon specific request by the Consumer Advocate, an agency is required to provide a brief status report on any agency activity.

H.R. 10835 is preferable to the S. 3970 in one respect in that it requires notification of proceedings requiring public notice without the necessity of a request from the Consumer Advocate. The drafting of both bills is inadequate, however, insofar as they do not make it clear that generic requests for notification of classes of agency activity in advance of the time that an agency is actually considering such matters are permissible. This is particularly important in the case of informal agency activity where one of the principal problems facing the Consumer Advocate is to discover that the activity is going on. To require a "specific" request for notification in this case, as S. 3970 does, is to severely reduce his effectiveness.

A further question arises consequential upon those just discussed. Once the Consumer Advocate has the information, may he make it public either by using it in agency proceedings or otherwise? H.R. 10835 does not allow him to make disclosures which would reveal trade secrets or privileged information or information which an agency claims is protected under The Freedom of Information Act (s. 209). S. 1177 imposes the same restrictions but also prohibits the disclosure of formulas, processes, plans or patterns of manufacture, research, methods of doing business, costs, names of customers or other competitive information otherwise unavailable to the public, except in proceedings where this would not unreasonably prejudice the possessor of the information and otherwise extraordinary health and safety hazards or extraordinary economic harm dictate public disclosure to protect the

consumer interest (s. 403(a)). S. 3970 prohibits disclosure of information exempted from The Freedom of Information Act, trade secrets or other confidential business information except where disclosure is necessary to protect the health or safety of the public and except where disclosure can be made, consistent with confidentiality, to courts, Committees of Congress or agencies in the course of the Consumer Advocate's advocacy functions (s. 208). There is little to choose between these formulations although that of S. 3970 seems to contain all necessary protections and is the most tidily drawn.

(b) Information from Business

(1) In the Course of Agency Proceedings

Under H.R. 10835, in any agency proceeding, the Consumer Advocate may require the agency to issue subpoenas for the production of documents from other parties, summoning of witnesses, etc. provided there is a showing of general relevance and reasonable scope of the evidence sought (s. 204(g)). This is the same power that any other party to agency proceedings possesses. S. 1177 contains essentially the same provision (s. 203(h)). S. 3970, however, expands the Consumer Advocate's powers in this respect. Section 203(e) allows him, in any agency, proceeding or activity, to require an agency to issue subpoenas, provided that under the agency's rules it has this power outside the context of formal proceedings. Other potential parties to proceeding do not, of course, have such a right, because they are not parties to any definable proceedings at that point. The Committee in its report (pp. 35, 36) offers no coherent rationale for this extension.

If the operating premise underlying the concept of the Consumer Advocate is that consumers through him should be able to become parties to agency proceedings and put on an equal footing qua representation as other parties, it is difficult to justify giving the Advocate more powers than other parties. For this reason the formulations of the subpoena power in the H.R. 10835 and S. 1177 are to be preferred.

(2) Outside the Context of Agency Proceedings or Activity

S. 1177 authorizes the Consumer Advocate in conducting any research, investigations, conferences or surveys, to issue written interrogatories, enforceable in a Federal Court, requiring any person to answer in writing specific questions. The only limitations on this power is that the demand for information must set forth with particularity the consumer interest involved and the purposes for which the information is sought (s. 205(d)(1)). S. 3970 contains a similar provision (s. 207(b)) except that it applies only to persons engaged in business and is limited to cases where the information is required by the health or safety of consumers or to discover consumer frauds. This provision does not authorize the inspection or copying of documents, papers, books, or records, nor can it be used to compel the attendance of any person, or to require the disclosure of information which would violate any relationship privileged according to law. In addition, a court may refuse to enforce an order if it finds it unnecessarily burdensome to the person from whom the information is sought, or is not relevant to the purposes for which the information is sought. Moreover, the procedure cannot be used where the information is already a matter of public record, or can be obtained from another agency. Also, any information so obtained after the Consumer Advocate has intervened or

expressed his intention of intervening in an agency proceeding where the information is obtainable by using the agency's subpoena powers is not admissible in that proceeding. Finally, while not expressly stated, the Fifth Amendment (in Canada, the defence of self-incrimination), may, of course, be pleaded as justification for refusal to answer interrogatories. H.R. 10835 contains no comparable provisions to these.

Clearly the provisions in S. 3970 are preferable to those in S. 1177 because of the more limited and discriminating terms in which they are drawn. Notwithstanding this, the provisions still give rise to some serious misgivings. Firstly, it gives the Consumer Advocate much greater power than is possessed by any other party or potential party to agency proceedings. Secondly, even with all the safeguards, it is difficult to allay understandable fears on the part of business of massive fishing expeditions. Thirdly, either individually or cumulatively, orders for information as envisaged in these provisions are bound to make major impositions on the time, resources and convenience of those from whom the information is sought. Fourthly, with the potential for collection of massive quantities of trade information that these provisions carry, fears of "leaks" of confidential information are bound to develop.

These provisions have already proved controversial ones. They do not seem critical to the due performance of the Consumer Advocate's advocacy functions, and rather than generating unnecessary business opposition to the whole advocacy concept, the better course may be to exclude them.

(5) Should the Consumer Advocate be Able to Participate in Informal Agency Activity?

There are no practical difficulties in the way of the Consumer Advocate intervening or participating in agency proceedings involving rule-making or adjudications. However, where difficulty arises is with a residual class of administrative activities undertaken by agencies. Here the activity will be unstructured and intervention or participation in any formal sense is simply not practicable. Warner W. Gardner, Chairman of the Committee on informal Agency Procedure of the Administrative Conference of the U.S. states:

> "A defensible generalization about organized activity of any form would be that if it looks good you haven't seen it all. This may be the case with administrative procedure broadly defined. The formal procedures of adjudication and rule-making embrace only a very small fraction of the Government's activities which affects its citizens. My own guess is that perhaps 90 per cent of the Government's work is conducted outside the boundaries of the Administrative Procedure Act".[52]

The same point has been made by other administrative law experts[53] Professor K.C. Davis in a letter to the Senate Committee on Government Operations[54] pointed out how important informal agency action may be in its impact on the consumer interest:

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52. "The Procedures By Which Informal Action Is Taken", Hearings before Subcommittee of Senate Committee on Government Operations, S. 1177 and H.R. 10835, 92nd Cong., 1st. Sess., Nov. 1971, Exhibit 15 p. 234.

53. Brice McAdoo Clagett, "Informal Action - Adjudication - Rule Making: Some Recent Developments in Federal Administrative Law (1971) Duke, L.J. 51; Professor David Shapiro, Letter to Congressman Jack Brooks cited by the Senate Committee on Gov't. Operations, Report on S. 3970, September 8, 1972, p. 31.

54. Ibid., p. 30.

> "Deciding whether or not to investigate a particular party or a particular subject, initiating action of any kind, deciding whether or not to prosecute, negotiating, settling, publicizing, applying informal pressure, threatening prosecution or other action such as threatening to publicize, advising, contracting, dealing, concealing, planning, recommending, supervising, Usually administrative inaction is more important than administrative action; the most important administrative decisions affecting consumers may involve, for instance, decisions not to initiate, not to investigate, not to prosecute, not to publicize. The biggest administrative power of all may be the power to do nothing when something ought to be done to protect consumers ... The most important agency decisions are made without formal processes".

While recognizing the importance of informal agency activity, the problem is to how to enable the Consumer Advocate to participate in it. On the one hand, to allow him to monitor all incoming and outgoing phone calls and mail of an agency would rapidly produce administrative chaos and paralysis in the functioning of government. On the other hand, to restrict his participation in agency activity to structured proceedings is to foreclose any consumer input into perhaps the most important area of an agency's decision-making. How does one draw lines when the very lack of structure in informal agency activity removes tangible referrents?

H.R. 10835 responds to this problem by tying the definition of "proceeding" to that in the Administrative Procedure Act. This is not necessarily restricted to formal proceedings but is confined to proceedings leading to a "final disposition" of a matter. While the scope of this definition is the subject of extensive debate, it is generally conceded that many of the kinds of informal agency decision-making instanced above do not fall within it. However, defenders of

the House bill point out that a number of other provisions in it will give the Consumer Advocate significant surveillance powers over informal agency activity:

(i) He can petition the agency to commence proceedings, require reasons for his failure to do so, and obtain court review of these reasons where they are arbitrary or capricious.

(ii) He can obtain any information from an agency under his general information gathering powers (s. 202(c)(2)).

(iii) He may communicate his views to any agency at any time, provided this is not inconsistent with law or agency rules.

These provisions have been vehemently criticized by consumer spokesmen who contend that they in fact provide no special facilities for consumer inputs into informal agency decision-making at all. The right to communicate views has always existed de facto. What is required is an ability to participate in this level of decision-making to the same extent as an agency may engage other parties in it, e.g. through meetings, discussions, conversations, correspondence, etc. S. 1177 also does not meet these criticisms. It allows the Consumer Advocate to intervene as a party in "any matter of proceeding" not involving internal operations within time limits specified in agency rules. While the scope of this is by no means clear, notwithstanding the inclusion of the expansive term "matter" the use of words such as "intervene", "party" and "within time limits specified in agency rules" seem to suggest proceedings of the type defined in the Administrative Procedure Act.

S. 3970 confronts these issues more directly than either of the two earlier bills. It accepts the case for allowing direct participation in informal decision-making but seeks to define its character and extent.

The bill says that the Consumer Advocate may participate in any "agency activity" where he is of the view that this may substantially affect the interests of consumers (s. 203(b)). "Agency activity"is defined as meaning "any agency process, or phase thereof ... whether such process is formal or informal, but does not mean any particular event within such process." (s. 401(4)). In exercising his right of intervention, the Consumer Advocate may, in an orderly manner and without causing undue delay,

(1) present orally or in writing to responsible agency officials relevant information, briefs and arguments, and

(2) have an opportunity equal to that of any person outside the agency to participate in such activity. Such participation need not be simultaneous, but should occur within a reasonable time.

The Report that accompanies the bill explains that these provisions are not intended to give a right to the Consumer Advocate to participate in the <u>same events</u> as other outside parties are participating in, e.g., informal meetings with agency officials, phone calls, correspondence, but instead to allow the Consumer Advocate to engage in the <u>same kind</u> of participation as other parties and roughly to the same extent (p. 32).

It will be clear from this that the differences between S. 3970 and H.R. 10835 in this respect are not large, because the real effect of the provision in S. 3970 is essentially to define the manner in which the Consumer Advocate may communicate his views to an agency engaged in informal activity, a right which H.R. 10835 grants to the Consumer Advocate in general terms. S. 3970 seems thus to provide a satisfactory resolution of the issue.

(6) Should the Consumer Advocate have a right of appeal where he did not participate in the initial proceedings?

All three bills give the Consumer Advocate the normal rights of appeal possessed by any party to an agency proceeding where he participated in the initial proceedings? However, where he did not participate, the bills provide different responses. S. 1177 gives him a right to appear, in the discretion of the court, as an amicus curiae in any appeal brought by another party (s. 203(d)(3)). H.R. 10835 gives him a full right of appeal as a party if the court is satisfied that the agency action may adversely affect consumers and that the interest of consumers are not otherwise adequately represented (s. 204(d)). S. 3970 essentially follows this formulation (s. 204(a)). The arguments against allowing the Consumer Advocate a right of appeal in these circumstances are obvious. The arguments in favour of a right of appeal are that otherwise he will simply be forced to file pro forma appearances in initial agency proceedings in order to preserve his right of appeal, because it will be impossible for him to make full appearances in all agency proceedings that could conceivably have an impact on the consumer interest. These arguments are persuasive, and moreover it should be remembered that on such an appeal the Consumer Advocate will be bound by the record of the earlier proceedings, and will be confined to raising arguments on the record as it stands. In the light of this, the danger of injustice either to other parties or to the agency involved seem minimal.

(7) Should the Consumer Advocate be able to initiate agency action?

All three bills permit the Consumer Advocate to request an agency to initiate action. This simply confirms a right which every citizen

possesses. The agency must notify the Consumer Advocate if it does not intend to take the requested action and provide a statement of the reasons for this decision. These will support an appeal if they are arbitrary or capricious (H.R. 10835, s. 204(e); S. 1177, s. 203; S. 3970, s. 203(d)). S. 1177 goes on to provide that in the event of an agency's refusal to initiate action, the Consumer Advocate may petitition the U.S. President who by order published in the Federal Register must decide whether the action shall be commenced. This provision was wisely abandoned in S. 3970 as creating dangers of undue political interference with the independence of the agencies.

In addition, S. 1177 (s. 203(e)) and S. 3970 (s. 203(f)) provide that a substantial number of citizens may request the Consumer Advocate to petition an agency to initiate action and if he refuses to do this he must notify the sponsors of the reasons for his refusal. This is a useful provision and an additional method of ensuring a proper measure of responsiveness on the part of the Consumer Advocate to his constituency. The provision would however, be improved by defining "substantial" precisely, e.g. 100 consumers.

(8) <u>What should be the role of the Consumer Advocate in monitoring consumer complaints?</u>

All three bills contain detailed provisions on this. While there are differences of detail in the mechanics from one bill to another that need not concern us here, all endorse the principle that he should be the chief clearing house in government of consumer complaints. Where a complaint indicates a possible violation of a statute, it is forwarded to the agency administering the statute for action, which the Consumer Advocate may then monitor. All complaints, whether involving

statutory violations or not, are forwarded to the merchants concerned for comment and, presumably, action where appropriate. After a specified period of time the complaints, with the names of all parties disclosed, are made public together with any comments from the merchants concerned, in a suitably collated form.

These provisions are vital to the effective functioning of the Consumer Advocate:

(a) They enable him to see what matters are concerning consumers.

(b) They enable him to monitor the performance of regulatory agencies in administering and enforcing laws.

(c) They enable other consumers to find out whom fellow consumers have found it unsatisfactory to do business with.

In addition to these provisions, there is a very strong case for giving the Consumer Advocate a limited advocacy role in a litigation context. In particular, he should be able to litigate a complaint on behalf of an individual consumer where a point of view of substantial public interest is involved. The South Australian Prices Act Amendment Act 1971 gives the Commissioner of Consumer Affairs in South Australia such a power. Further, the Consumer Advocate should be able to litigate complaints, whether involving statutory violations or private law causes of action, on behalf of classes of consumers similarly affected. The Saskatchewan Department of Consumer Affairs Act 1972 gives the Attorney-General of that province such a power and it is one eminently appropriate to assign to a Consumer Advocate.

(9) Should the Consumer Advocate be given any non-advocacy functions?

While early U.S. bills involved the Consumer Advocate in matters such as product testing and development of information tag systems for

products, these functions have gradually been shed as the legislation has evolved and as the realization has grown that the Consumer Advocate's overriding function is an advocacy function. To encumber him with other functions is likely only to derogate from his effectiveness in that role. However, all three U.S. bills here under discussion properly see general research into consumer problems as a necessary back-drop to effective advocacy and clearly this would be a major concern of the Consumer Advocate. In Canada, he could well take over the functions of the Canadian Consumer Council in this regard.

V CONCLUSION

This paper has sought to establish the general rationale for creating an Office of the Consumer Advocate and to develop a series of proposals forimplementing that concept which are at once strong and effective yet balanced and responsible in their impact on their regulatory process and those elements of the business community subject to that process.

We have come recently to recognize that simply passing more consumer laws may have little impact on unsolved consumer problems, that what is often needed is not more laws but more enforcement. An Office of the Consumer Advocate is the most imaginative and viable proposal yet developed for monitoring the quality of the administration and enforcement of our consumer protection laws. Ralph Nader has called the U.S. Consumer Advocate bills "the most important consumer legislation ever considered by the U.S. Congress".[55]

Unless we in Canadaare prepared to experiment with this and similar concepts, we will have to learn to live with the knowledge that the imbalances in market power which prompted many regulatory initiatives in fact often survive reinforced and legitimized by the very apparatus set up to counter-act them. As we move forward into an even more technologically dominated future, unless we can devise mechanisms that will ensure a democratic regulatory ideal, the "new despotism" of which Lord Hewart once warned will have come to rule us by default.

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55. Hearings before a Subcommittee of the Committee on Government Operations, H.R. 91st Cong. 2nd. Sess., H.R. 6037 (Revised), April 1970, p. 129.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

Appointment of a Consumer Advocate:

(1) A Consumer Advocate should be appointed by the Federal Government to represent consumer interests before government and its regulatory agencies.

(2) The empowering legislation should appoint an Advisory Council composed of representatives of organized consumer bodies and others with a special interest in, and identification with, consumers' problems. This Council should make nominations for appointment to the office of the Consumer Advocate; the Government should be required to appoint a person who has the endorsement of this Council. He should be appointed for a term of years, be dismissable only for cause, and be given a minimum commitment of government financial support for the term of his appointment. The Council would act in an advisory capacity to the Consumer Advocate after his appointment.

Functions:

(3) The Consumer Advocate should be empowered to represent consumer interests before regulatory agencies, government departments discharging regulatory or enforcement functions in the consumer area, Parliamentary Committees and Ministers of Government.

(4) The Consumer Advocate should be entitled to intervene as a full party in regulatory proceedings and not be limited to an *amicus curiae* role only. The Consumer Advocate should also be entitled to litigate cases for individual consumers where an issue of substantial public interest is involved and bring class actions on behalf of numerous consumers similarly affected by an irregular market activity.

(5) He should not, however, be entitled to intervene in criminal proceedings brought before the courts to sanction violations of consumer statutes or regulatory orders except as an amicus curiae.

Right to Information:

(6) He should be empowered to obtain from government and its regulatory agencies any documents or other information that he requires to discharge duties effectively except information classified for security purposes and personnel information or information the conveying of which would be an invasion of personal privacy.

(7) Information so obtained should be permitted to be disclosed publicly except where the claim of Crown privilege is applicable or where the information contains trade secrets or confidential business data.

(8) In agency proceedings, the Consumer Advocate should have the same right as any other party to subpoena documents, issue interrogatories or make discovery. He should not be entitled to require information from private parties outside the context of agency proceedings.

Informal Agency or Departmental Decision-Making:

(9) The Consumer Advocate should be entitled to participate in informal Departmental or agency decision-making to the extent that other parties outside the relevant Department or agency are permitted to participate in such decision-making although such participation need not be simultaneous.

Right of Appeal:

(10) The Consumer Advocate should have the same rights of appeal from agency or Departmental decisions as other parties, even where he did not participate in the initial proceedings.

Right to Request the Initiation of Agency or Departmental Action:

(11) The Consumer Advocate should be entitled to request an agency or Department with regulatory or enforcement functions to commence action, and if such agency or department declines to take the requested action, it must furnish reasons for its decision. If these reasons are arbitrary or capricious, the Consumer Advocate should have a right of judicial review.

Consumer Complaints:

(12) The Consumer Advocate should act as a clearing-house for all consumer complaints presently directed to various elements of government. Where these disclose possible violations of a statute, they should be forwarded to the appropriate agency or Department for action, which the Consumer Advocate would be entitled to monitor. Copies of all complaints, whether involving a statutory violation or not, should also be forwarded to the merchant concerned for comment and possible action. The Consumer Advocate should maintain a public record in suitably collated form, of all consumer complaints together with merchants' responses. The names of the parties should normally also be public.